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IN THE
COURT OF APPEALS OF INDIANA

ALBERT CHALMERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0608-CR-353
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry Shewmaker, Judge
Cause No. 20C01-9609-CF-33

February 14, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Albert Chalmers belatedly appeals his sixty-five year sentence after pleading guilty to murder, raising the issue of whether the trial court properly imposed the maximum sentence in light of mitigating factors he alleges it failed to consider. The State cross-appeals on the issue of whether the trial court properly granted Chalmers' Petition for Leave to File a Belated Notice of Appeal. Concluding that Chalmers has shown the requisite diligence, and that the trial court overlooked relevant mitigating circumstances during sentencing, we vacate his sentence and remand to the trial court with instructions to enter a fifty-five year sentence.

Facts and Procedural History

On June 22, 1996, while at Eddie's Social Club in Elkart, Indiana, Chalmers was drawn into a confrontation between a friend he was visiting and several other young men. During the confrontation, Chalmers pulled a gun and shot Dewayne Miller twice, killing him. Chalmers also fired the gun at Terrence Witherspoon, who was wounded. On June 26, 1996, Chalmers was charged with murder and attempted murder, subsequently entering into a plea agreement on November 21, 1996. Chalmers pled guilty to murder in exchange for the State's agreement to drop the attempted murder charge. Sentencing was left to the discretion of the trial court.

At the sentencing hearing on December 19, 1996, the trial court twice stated that it found no mitigating circumstances, but listed several aggravating factors including that Chalmers was on bond at the time of the shootings, his possession and use of the gun, that the shooting occurred in a crowded place, the fact that there were two victims, and that Chalmers

fled the jurisdiction after the crime. The trial court imposed the maximum sentence of sixty-five years.

In February of 2000, Chalmers filed a *pro se* Petition for Post Conviction Relief and Affidavit of Indigency. Chalmers' appointed counsel requested the trial court defer ruling on the post-conviction petition, and the request was granted until such time as Chalmers requested a hearing on the matter. After twice substituting counsel, in February of 2006 Chalmers filed a *pro se* Petition for Leave to File a Belated Notice of Appeal. This petition was denied on February 3, 2006, the day it was filed. However, on February 24, 2006, Chalmers also filed a Notice of Appeal, which the chronological case summary identifies as being "granted" on April 6, 2006. Transcript at 4. This appeal is now before us.[1]

Discussion and Decision

I. Belated Appeal

First, we address the State's request that Chalmers' appeal be dismissed for lack of jurisdiction because the trial court improperly granted his Petition for Leave to File a Belated Notice of Appeal. The trial court has discretion in reviewing a petition for permission to file a belated notice of appeal, and its decision will not be disturbed unless an abuse of discretion is shown. Townsend v. State, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), trans. denied. However, we review the decision de novo when the allegations contained in the motion itself

[1] The chronological case summary does not indicate Chalmers ever reasserted his Petition for Post-Conviction Relief by requesting a hearing. Also, the record is unclear as to the trial court's rationale for denying Chalmers' petition in February, but accepting his Notice of Appeal in April. As the State does not rely on this discrepancy to contend that Chalmers' appeal is not properly before us, we do not address it

provide the only basis in support of a motion. Id.

Although a person who enters a plea of guilty is not permitted to challenge the propriety of the conviction on direct appeal, he is entitled to contest the sentence imposed upon him "where the trial court has exercised sentencing discretion, i.e., where the sentence is not fixed by the plea agreement." Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004). Post-Conviction Rule 2 permits an individual who fails to file a timely notice of appeal to petition for permission to file a belated notice of appeal. Id. at 233. However, the failure to file a timely notice of appeal must not be the fault of the individual, and the individual must be diligent in requesting permission to file a belated notice of appeal. Id. (discussing Ind. Post-Conviction Rule 2(1)). The petitioner has the burden of proving his grounds for relief by a preponderance of the evidence. Townsend, 843 N.E.2d at 974.

Here, the State argues only that Chalmers did not act diligently in pursuing permission to belatedly appeal his sentence. "'There are no set standards defining delay or diligence; each case must be decided on its own facts.'" Beaudry v. State, 763 N.E.2d 487, 490 (Ind. Ct. App. 2002) (quoting Tolson v. State, 665 N.E.2d 939, 942 (Ind. Ct. App. 1996)). "'Factors affecting the determination include the defendant's level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether the defendant was informed of his appellate rights, and whether he committed an act or omission which contributed to the delay.'" Id. The State does not dispute that Chalmers was not at fault for the delay because he was not notified by the trial court of his ability to appeal his sentence.

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further. Rather, we treat Chalmers' Petition for Leave to File a Belated Notice of Appeal as if it were granted,

As our supreme court noted in Collins, 817 N.E.2d at 233, Indiana Post-Conviction Rule 2 will generally be available where "the trial court at a guilty plea hearing does not advise the defendant in an open plea situation that the defendant has the right to appeal the sentence to be imposed."

The State's argument is that Chalmers' Petition for Leave to File a Belated Notice of Appeal must fail because it was filed February 3, 2006, although he was sentenced on December 19, 1996. Although he did not directly contest his sentence until almost a decade after his sentence was imposed, he attempted to pursue other avenues of recourse, both on his own and with the apparent assistance of a succession of three attorneys from the public defender's office. As for the requisite diligence in pursuit of permission to file a belated notice of appeal, his petition specifically asserts that he had no prior knowledge of his right to pursue a direct appeal. Together with the fact that the trial court failed to advise Chalmers of his right to appeal the sentence, we see no other evidence that Chalmers could have included in support of his motion. Cf. Hull v. State, 839 N.E.2d 1250, 1254 (Ind. Ct. App. 2005) (allegations in motion to file a belated notice of appeal that trial court did not advise defendant of appellate rights and that defendant was diligent in pursuing right to appeal were sufficient). Thus, Chalmers was sufficiently diligent in seeking permission to file a belated notice of appeal.[2] See Gallagher v. State, 410 N.E.2d 1290, 1292 (Ind. 1980) (finding

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and turn instead to the arguments of the parties.

[2] In concluding that Chalmers is entitled to challenge his sentence at this late date, we acknowledge the difficulties inherent in revisiting a sentence ten years after the fact. In so holding, we are constrained by precedent as dictated by our supreme court in Collins.

diligence even when petition was filed nine years after trial where petitioner was not advised of his right to appeal). We therefore address the merits of Chalmers' arguments on appeal.

II. Propriety of Chalmers' Sentence[3]

During sentencing, the trial court flatly stated twice that it did not see any mitigating circumstances. Tr. at 31, 33. Chalmers argues that the trial court improperly imposed the maximum sentence because it failed to consider three significant mitigating circumstances supported by the record. These proffered mitigating circumstances include his lack of previous criminal convictions, his remorse and acceptance of responsibility, and the fact that he pled guilty. Chalmers does not dispute the aggravating factors identified by the trial court, or the weight given to them, but only claims that these mitigating circumstances should be weighed against the aggravators in order to reduce his sentence from the maximum imposed.

Sentencing decisions, including whether to enhance a sentence, are within the trial court's discretion and will be reversed only for an abuse of discretion. Edmonds v. State, 840 N.E.2d 456, 461 (Ind. Ct. App. 2006), trans. denied, cert. denied, 127 S.Ct. 497 (Oct. 30, 2006). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Henderson v. State, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006). It is within a trial court's discretion to decide both the existence and weight of significant mitigating circumstances. Samaniego-Hernandez v.

[3] Chalmers does not raise an argument under Indiana Appellate Rule 7(B), under which we may revise a defendant's sentence if inappropriate in light of the nature of the offense or the character of the offender. Also, Chalmers was sentenced prior to the 2005 amendment of Indiana's sentencing statutes. Because Post-Conviction Rule 2 provides that a belated appeal "shall be treated for all purposes as if filed within the prescribed period," this appeal is treated as if it were filed in a timely fashion following his 1996

State, 839 N.E.2d 798, 806 (Ind. Ct. App. 2005). However, modification of a presumptive sentence based upon aggravating or mitigating circumstances requires the trial court to identify all significant mitigating and aggravating circumstances, state the specific reason why each circumstance is determined to be mitigating or aggravating, and articulate its evaluation and balancing of the circumstances. White v. State, 847 N.E.2d 1043, 1045 (Ind. Ct. App. 2006). We examine both the written sentencing order and comments made by the trial court during the sentencing hearing to determine whether the trial court adequately explained its reasons for the sentence. Vazquez v. State, 839 N.E.2d 1229, 1232 (Ind. Ct. App. 2005), trans. denied.

Although the trial court must consider evidence of mitigating factors presented by a defendant, it "is not obligated to weigh or credit mitigating factors in the manner a defendant suggests. Nevertheless, if it fails to find a mitigator clearly supported by the record, a reasonable belief arises that the mitigator was improperly overlooked." Scott v. State, 840 N.E.2d 376, 382 (Ind. Ct. App. 2006), trans. denied. "On appeal, an allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." Samaniego-Hernandez, 839 N.E.2d at 806. If we find an irregularity in a trial court's sentencing decision, we may remand to the trial court for a clarification or new sentencing determination, affirm the sentence if the error is harmless, or reweigh the proper aggravating and mitigating circumstances at the appellate level. Payne v. State, 838 N.E.2d 503, 506

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conviction and sentences, and we discuss his sentence in terms of enhancement of the presumptive, rather

(Ind. Ct. App. 2005), trans. denied.

A. Lack of Prior Criminal Convictions

"A trial court must consider a defendant's criminal record during sentencing, and may take into account as a mitigating circumstance the defendant's lack of a history of criminal activity." Weaver v. State, 845 N.E.2d 1066, 1073 (Ind. Ct. App. 2006), trans. denied. As a general rule, the "lack of a criminal record must be given substantial weight as a mitigator." Id.; see Leone v. State, 797 N.E.2d 743, 748 (Ind. 2003).

Here, Chalmers argued at sentencing that the absence of prior convictions listed in his presentence report was entitled to mitigating weight. The trial court noted only that the report indicated two prior arrests for carrying a concealed weapon, but that charges in both instances were dropped. Moreover, although a charge was pending against Chalmers for possession of cocaine at the time of the shootings, no conviction had yet resulted. Thus, the record supports Chalmers' assertion that his lack of prior criminal convictions is a mitigating circumstance that should have been identified and considered by the trial court.

B. Chalmers' Guilty Plea, Acceptance of Responsibility, and Remorse

A defendant who pleads guilty extends a benefit to the State, accepts some responsibility for the crime, and thus, deserves to have some mitigating weight extended to him at sentencing based upon the plea. Scott, 840 N.E.2d at 382-83. However, a guilty plea is not automatically a significant mitigating factor, Comer v. State, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005), trans. denied, but rather, its significance must be determined on a case-by-

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than advisory, sentence.

case basis. Francis v. State, 817 N.E.2d 235, 238 n.3 (Ind. 2004). Here, the trial court accepted the plea agreement between Chalmers and the State, and was therefore "inherently aware" of it as a mitigating factor. Scott, 840 N.E.2d at 383. Nevertheless, the trial court failed to identify it. Chalmers argues that this factor should have been considered within the "medium to high range" of mitigation. Although the State did dismiss an attempted murder charge against Chalmers in exchange for his plea of guilty to murder, Chalmers entered his plea just five months after the crime and before any trial date had been set. Thus, although Chalmers did receive a benefit by pleading guilty, the State also received a substantial benefit, and the guilty plea should have been identified and considered as a significant mitigating factor.

Lastly, Indiana courts have recognized remorse as a valid mitigating circumstance in conjunction with a guilty plea. Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005). Here, the presentence report included a probation officer's opinion that Chalmers "fully understands the seriousness of this offense and I believe he is generally remorseful for his actions." Appellant's App. at 25. Chalmers argued heavily for this mitigating circumstance prior to sentencing, although he made no statement of remorse to the court, his victims, or their families. Even so, the trial court failed to identify and consider Chalmers' remorse. Because the record supports a finding of remorse, the trial court erred in not identifying and considering it as a mitigating factor.

C. Remedy for Sentencing Irregularity

Our analysis reveals that the trial court erred in sentencing Chalmers when it did not

identify and consider several mitigating factors clearly supported by the record. The failure to find mitigating circumstances is not harmless because Chalmers was sentenced to the maximum possible term, and had the mitigating circumstances been properly considered, his sentence could have been reduced. Because the record is sufficient to allow our independent evaluation of the aggravating and mitigating circumstances, we choose not to remand this cause, but exercise our discretion to determine an appropriate sentence.

Chalmers does not challenge the aggravators found by the trial court, and we agree that they are all appropriate and significant. However, they are not so significant as to completely outweigh the several significant mitigating factors overlooked by the trial court, especially as the aggravating factors cited by the trial court are primarily iterations of the same aggravator – namely, the nature and circumstances of the crime. As to the guilty plea, Chalmers benefited significantly from the plea, and the fact that he fled from the jurisdiction after the shootings and seems to blame the events on his consumption of alcohol offsets somewhat the degree to which the guilty plea could be considered an acceptance of responsibility; however, coming as it did so early in the process, the plea was clearly a significant benefit to the State and it is therefore entitled to substantial mitigating weight. Chalmers' near-complete lack of criminal history prior to these events is entitled to substantial mitigating weight. And his remorse, though unexpressed at the sentencing hearing, is documented in both his statement to the police after arrest and in the presentence report prepared before sentencing and is entitled to some mitigating weight, as well.

With due consideration of the aggravating factors found by the trial court and the

mitigating factors found herein, we conclude that they are in balance and that Chalmers' sentence should be revised to the then-presumptive sentence of fifty-five years.

Conclusion

Chalmers sufficiently established that he was not at fault for his failure to file a timely notice of appeal, and showed that he was diligent in pursuit of leave to file a belated notice of appeal. The trial court improperly failed to identify and consider significant mitigating factors prior to imposing upon Chalmers the maximum sentence of sixty-five years. We therefore vacate his sentence and remand for his sentence to be revised to a term of fifty-five years.

Vacated and remanded.

BARNES, J., concurs.

SULLIVAN, J., concurs in result with separate opinion.

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	)	
Appellant-Defendant,	)	
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	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

SULLIVAN, Judge, concurring in result

The majority decision expresses a degree of reticence with regard to the application of Collins v. State, 817 N.E.2d 230 (Ind. 2004). See footnote 2, supra. I do not share that reticence.

This is a case arising under Post Conviction Rule 2. It is not a case arising under Post Conviction Rule 1. Our Supreme Court in Collins unanimously and specifically note that if a convicted individual is diligent,[4] he may seek relief under P-C.R. 2. The Supreme Court makes no distinction for P-C.R. 2 proceedings based upon the lapse of a period of years. Thus our case is unlike cases arising under P-C.R. 1, such as Hall v. State, 849 N.E.2d 466 (Ind. 2006).

Furthermore, and more importantly, Post Conviction Rule 2 itself says that such a

[4] In the case before us, we specifically note that Chalmers was diligent in seeking relief.

belated appeal "shall be treated for all purposes as if filed within the prescribed period." (emphasis supplied).

Subject to the above comment, I concur in the vacation of the sentence imposed and remand for imposition of the presumptive term of fifty-five years.